

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

**VIRNETX INC., and
LEIDOS, INC.,**

Plaintiffs,

v.

APPLE INC.,

Defendant.

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C.A. No. 6:12-cv-00855-RWS

JURY TRIAL DEMANDED

~~**FILED UNDER SEAL**~~
PUBLIC VERSION

**VIRNETX INC.'S RESPONSE TO THE COURT'S QUESTION AT THE PRETRIAL
CONFERENCE REGARDING HAVING ALL LIVE WITNESSES TESTIFY BY VIDEO**

VirnetX Inc. (“VirnetX”) objects to conducting *all* live testimony through video conference as a way to resolve Apple’s recent request to continue the August 17 trial setting. When available, “it is always preferable to have witnesses present testimony in-person from the witness stand in the physical presence of the jury,” Dkt. 387 at 6, *Optis Wireless Tech., LLC v. Apple Inc.*, No., 2:19-cv-00066-JRG (E.D. Tex. July 14, 2020), and three-quarters of all expected witnesses are available to testify in-person in Tyler. VirnetX’s witnesses have planned for attendance at this trial for months in reliance on the Court’s Docket Control Order, and they are now just days from traveling to Tyler. However, as indicated during the August 3, 2020 pretrial conference, VirnetX is sympathetic to [REDACTED] and [REDACTED] inability to attend trial in person, has no intention of suggesting or supporting any negative inference from their absence, and is willing to work with Apple Inc. (“Apple”) and the Court to draft an appropriate instruction (or joint remark from the parties) concerning the two witnesses who will be testifying by video.

Apple notably embraced video trial testimony in the previous trials. Indeed, during the willfulness phase of the -855 case, Apple presented witness Simon Patience's trial testimony via video conference, requiring the parties to conduct direct and cross examinations in Tyler the day before he was scheduled to take the stand for the second time. As these are "unprecedented times, which call for unprecedented measures," the Court need only stray from the norm where required. Dkt. 387 at 6, *Optis*. And here, [REDACTED] and [REDACTED] are the only witnesses who cannot testify live as a result of COVID-19 complications. As a result, VirnetX does not agree to a trial with all witnesses presented by video regardless of availability and, rather, requests that those witnesses who are unable to attend in person be presented by live video stream and the remainder of the witnesses testify live.

DATED: August 4, 2020.

Respectfully submitted,

CALDWELL CASSADY & CURRY

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**ATTORNEYS FOR PLAINTIFF
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was served on counsel of record via email on August 4, 2020, to the extent allowed by the Agreed Protective Order.

/s/ Jason D. Cassady
Jason D. Cassady

CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

The undersigned hereby certifies that the foregoing document is authorized to be filed under seal pursuant to the Agreed Protective Order submitted in this case.

/s/ Jason D. Cassady
Jason D. Cassady